

NTSB Order No. EA-5115

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 8th day of October, 2004

Respondent.

Docket SE-16768

Respondent and the Administrator have both appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on June 4, 2003, following an evidentiary hearing.<sup>1</sup> The law judge affirmed alleged violations of 14 C.F.R.

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91.103 and 91.141, but dismissed the alleged violation of section 91.13(a),<sup>2</sup> and modified the sanction from a 150-day suspension, as requested by the Administrator, to a 100-day suspension of respondent's pilot certificate. We grant respondent's appeal, deny the Administrator's appeal, and dismiss the complaint.

It is undisputed that on November 20, 2001, respondent was the pilot in command of a PA-28-161 on an instructional flight from Northeast Philadelphia Airport to Hagerstown, Maryland, and that the flight penetrated an area of prohibited airspace known as P-40. It is further undisputed that the radius of area P-40, which encircles the Presidential retreat of Camp David, had been temporarily expanded from 3 miles to 8 miles, after September 11, 2001. While the original prohibited area (which respondent's flight did not penetrate) was depicted on sectional aeronautical charts published by the Department of Transportation, no government publications were available prior to respondent's November 20 flight that depicted or referred to the expanded prohibited area. The temporary expansion was announced by way of a NOTAM, the contents of which were supposed to have been conveyed to affected pilots by Flight Service Station (FSS)

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<sup>2</sup> Section 91.103 requires the pilot in command, before beginning a flight, to become familiar with all available information concerning the flight. Section 91.141 prohibits operation of an aircraft over or in the vicinity of any area to be visited or traveled by the President, the Vice President, or other public figures, contrary to the restrictions established by the Administrator and published in a Notice to Airmen (NOTAM). Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

briefers during pre-flight briefings.<sup>3</sup>

Respondent and his student both stated they were aware of the existence of the P-40 prohibited airspace (as published on the sectional chart with a 3-mile radius), and that they discussed it as part of their pre-flight planning. However, respondent's student, who obtained the pre-flight briefing, testified that the FSS briefer did not mention the NOTAM pertaining to the expansion of P-40 during the briefing. No recording of the briefing or any other FAA record of its contents was available, because no preservation request was made within the 15-day window that such records are routinely maintained.

The Administrator argues that the evidence supports a finding that the NOTAM information was provided during the briefing, citing witness testimony describing the prescribed process by which FSS briefers were supposed to retrieve and disseminate relevant NOTAM information to pilots during the time period at issue, and asserting that there is a presumption of regularity in the official acts of public officials. The Administrator argues that it is more likely that the student made a mistake and missed the NOTAM information than it is that the FSS briefer made a mistake in failing to provide the information.

In affirming the violations of section 91.103 and 91.141,

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<sup>3</sup> An alternative way for pilots to obtain such pre-flight information is through the computer-based direct user access terminal system (DUATS). However, the flight school respondent operates out of was not equipped with DUATS capability, and the Administrator stipulated that respondent could rely on the FSS briefing to provide relevant NOTAM information.

the law judge suggested that the respondent may have shown a lack of care, judgment, and responsibility in relying on his student to obtain the FSS briefing. However, in dismissing the section 91.13(a) charge and reducing the sanction, the law judge stated he had "a feeling that if NOTAMs had been mentioned to the student he would have conveyed that" to respondent. (Transcript (Tr.) 215.) Further, in finding that respondent's entry into prohibited airspace was inadvertent, the law judge stated that he was aware of other cases in which the FAA failed to disseminate NOTAM information to pilots. Accordingly, although the law judge did not make a direct finding as to the content of the briefing, the law judge appears to have implicitly concluded that the FSS briefer did not provide the NOTAM information.<sup>4</sup>

Respondent contends that the law judge's implicit finding that the NOTAM information was not provided in this instance is supported by the weight of the evidence. Respondent argues that

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<sup>4</sup> The Administrator contests this finding, arguing that it is based on the faulty premise that (as noted by the law judge at Tr. 214) this student had on at least one previous occasion transmitted NOTAM information to respondent after obtaining an FSS briefing himself. We note that when the law judge issued his oral initial decision at the conclusion of the hearing, the only evidence in the record on this point was respondent's testimony that the student had previously relayed NOTAM information to him. Although during his deposition the student apparently did not recall such prior instances, we note that the law judge reviewed the student's deposition testimony before re-affirming his earlier initial decision and had an opportunity to modify his decision. However, he did not do so. Accordingly, the law judge apparently concluded that respondent's recollection (that the student had, on at least one occasion prior to the flight here at issue, relayed NOTAM information received from an FSS briefer) was still credible and that his earlier finding was still sound.

he should not be held responsible for violating an airspace restriction about which neither he nor his student had been given notice. He also argues that a negative inference as to the content of the briefing is appropriate in cases such as this when the Administrator does not preserve the briefing tapes.

We agree with respondent that the law judge's apparent finding that the briefer did not provide the NOTAM information is supported by the evidence in this case. While official acts may be entitled to a presumption of regularity, it was not unreasonable for the law judge to find that this presumption was overcome by the testimony that the NOTAM information was not provided on this occasion, especially in light of the other evidence in the record. Specifically, we note the dramatic increase in NOTAM information that briefers had to assimilate and summarize in the aftermath of September 11,<sup>5</sup> and the FAA's acknowledgment that there have been other instances in which pilots have not been informed of temporary NOTAM restrictions.<sup>6</sup>

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<sup>5</sup> The FAA's Flight Service Division Manager testified that after September 11, 2001, there was a 200-300% increase in the amount of NOTAM information provided to pilots and, as a result, briefers would have to read and assimilate up to 55 pages of NOTAMS for a standard pre-flight briefing and make a judgment as to which NOTAMS were relevant to the particular flight.

<sup>6</sup> The FAA's Flight Service Division Manager indicated that over the past 6 years, 6 operational errors involving a briefer's failure to disseminate relevant NOTAM information to pilots had been identified through quality assurance reviews. Although this appears to indicate very few errors, we note that this error rate (1 error per year) may under-represent the actual error rate during that time period; the record does not indicate how many briefings were monitored as a part of the quality assurance reviews and, therefore, it is not clear what percentage of those

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In light of these factors, and given the absence of any official record documenting the contents of the briefing, a conclusion that the information was not given in this instance is not unreasonable.

However, we do not agree with respondent that the Administrator's failure to preserve the briefing tape should automatically result in an adverse inference. Nonetheless, we note that in cases involving airspace violations potentially related to national security, such as this one, taking timely action to preserve briefing tapes would clearly aid the Administrator not only in litigating subsequent enforcement cases, but also in improving quality control regarding the transmittal of such information and, thereby, potentially improving safety and security. The heightened security concerns associated with violations of prohibited airspace following the events of September 11, 2001, and the seriousness with which FAA and law enforcement agencies address such violations<sup>7</sup> would seem to dictate extra care in preserving evidence.

The Air Traffic Manager at the local FSS testified that briefing tapes are preserved only if there is a request or a formal complaint within 15 days of the briefing. According to the Administrator, it currently takes 20 days for information

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briefings involved errors.

<sup>7</sup> Upon entering the prohibited airspace, respondent's flight was intercepted by fighter jets, and respondent testified that after he landed at Hagerstown, he was questioned by both Federal  
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about a potential enforcement action to reach the Flight Standards District Office responsible for processing the case.<sup>8</sup> But other arms of the Federal government, including the FAA's air traffic control service, knew immediately of respondent's airspace violation and, presumably, that it would likely result in an eventual enforcement action.

In any event, if, as indicated in this case by the weight of the evidence, the briefer did not provide the NOTAM information, it is inappropriate to hold respondent responsible for violating its prohibition. See Graves and Davis, 3 NTSB 3900, 3903 (1981) (no violation when the respondent's inadvertent entry into restricted area resulted from reliance on erroneous information). Pilots are not held to a standard of strict liability. Administrator v. Rolund, Order Denying Reconsideration, NTSB Order No. EA-4123 at 5 (1994), citing Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 (1993).

Further, if the briefing was deficient, then it is of little import whether respondent or his student called for the briefing. However, we do not endorse respondent's position that it was reasonable for him to rely on his student (who at that time had only 26 hours of flight time) to obtain the briefing. In light of the student's inexperience and the highly-charged nature of

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and local law enforcement officials. (Tr. 177.)

<sup>8</sup> Given this admission, we question the utility of a policy of retaining briefing tapes for a period of time that is too short to serve the best interests of either airmen or the

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airspace security concerns that prevailed in the aftermath of September 11, we believe respondent would have been well-advised (even if he were not required) to independently verify the pre-flight planning information provided to him by the student.

In light of our granting of respondent's appeal, we need not address the issues raised by the Administrator's appeal.<sup>9</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted;
2. The Administrator's appeal is denied; and
3. The Administrator's complaint is dismissed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING and HERSMAN, Members of the Board, concurred in the above opinion and order.

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Administrator in the enforcement context.

<sup>9</sup> The Administrator's appeal brief challenges the dismissal of the section 91.13(a) violation and the reduction in sanction.